I. A New Climate for Contractual Practice in International Commerce

A. ECONOMIC DEVELOPMENTS; NEW MARKETS AND CHANGING BARGAINING POSITIONS

Contract law and practice in international commerce is not unaffected by the changing climate and scenario of international markets. The economic integration of the world has made some progress over the last decades.¹ In this development, we can observe, among others, two specific phenomena: the opening of new markets and a change in the bargaining position of countries as market participants.
Important new markets for technology have been opened in oil-exporting countries since the remarkable increase in bargaining strength and income of the OPEC countries in the 1970s. Another remarkable development is in international financial markets. Starting with the rise of the so-called euro-capital market in the mid-1960s, new international capital and new financial markets with their centres in Europe and, later, in Asia, have developed. In general, the international banking system has substantially expanded and the banking infrastructure of many developing countries has reached a level similar to that of industrialised countries.

International commerce largely depends on the functioning of this international banking network which provides the necessary payment and credit facilities.

The bargaining power and attitude of many countries as participants in the world markets have changed. Since the end of the decolonisation era, many third world countries have become responsible and important partners in international commerce. The so-called threshold countries among them have gradually changed their market positions, reflecting the economic progress they have made. Some of them, such as India, have become exporters of technology to other countries. The rise of the OPEC cartel has dramatically changed the bargaining power of OPEC member countries. In this case, the old rule that a technology recipient country is normally in a weaker bargaining position, is no longer true. At the same time, the balance of payment and international debt position of many oil-importing countries has dramatically deteriorated. As lawyers, we are not called upon to discuss in detail the economic and political issues involved; but we have to bear in mind these developments when we discuss contracts as the legal tools for the peaceful transfer of goods, services and technology in a fair balance of interests.

B. NEW TYPES OF TRANSACTIONS AND CONTRACTS

New types of business transactions have developed which require new legal forms and contractual patterns. The most remarkable development in this respect had taken place in the area of the transfer of technology. Traditionally, such a transfer would be carried out in either of two ways. The parties either made a contract for the sale of machines, which was normally combined with a licensing and know-how contract; or, when a more complex technology transfer was intended and the recipient country felt that it could not handle this technology, the transferor came as an investor to form a subsidiary, often as a joint venture with the participation of the host country. These legal patterns are still in use. To a large extent, however, they have been replaced by complex contractual schemes on the construction and delivery of whole factories under turnkey or cost-plus contracts and the like, accompanied not only by licensing and know-how contracts, but also by undertakings for the training of staff or the management of the factory.

Similarly, complex networks of contracts have come into use for important civil works, such as the construction and running of harbours, airports, educational facilities and whole cities. In the area of drilling and mining and the exportation of ore, oil and other raw materials, the traditional concession agreement has been replaced in many cases by other complex contractual schemes which reflect a stronger position of the host country and follow the principle of national sovereignty over natural resources, which is generally advocated today.

C. TERMS OF CONTRACT PRESCRIBED BY GOVERNMENTS

A large number of commercial transactions with third world countries are concluded and carried out with governmental agencies as parties. In many of these countries, special legislation on foreign trade and, in particular, on the transfer of technology, prescribes the precise terms of the contracts for these transactions. In addition, in many cases public bidding procedures are instituted, which leave foreign contractors no freedom to bargain over the contractual terms. Instead, national legislation and the administrative practice of the authorities involved decide on the contractual patterns, unless special circumstances lead to special arrangements.

D. CONFLICT MANAGEMENT AND ADAPTATION OF CONTRACTS

Many of the contracts mentioned in subsection B, above, are carried out over a long period of time and cover a variety of different and complex undertakings. Often, certain details of the contractual undertakings can only be precisely defined at
a more advanced stage of the work, or have to be adapted to new circumstances. Other contracts provide for the co-
operation of the buyer, who may undertake to supply personnel or materials, or to perform certain tasks necessary to
enable the contractor to fulfil his contractual duties. There is a growing need, particularly in these long-term contracts, for
informal and effective procedures to adapt a contract to changed circumstances and to settle disputes in such a way that
the original contract and its specific balance of interests is preserved as a basis for future cooperation between the
parties. A variety of contractual clauses has been developed to this effect. In turnkey and similar contracts, the role of
the engineer as defined in the FIDIC rules has become important.\(^9\) Third party intervener clauses are often used.\(^10\) In 1978,
the ICC promulgated rules on the adaptation of contracts followed in 1980 by the UNCITRAL Conciliation

Rules.\(^11\) The problem at issue is to reconcile the basic principle of the binding force of contracts (\textit{pacta sunt servanda}) as
a common ground for all commercial transactions, along with the specific needs of long-term contracts.

II. Uniformity and Diversity in Drafting Contracts

A. THE TAILOR-MADE CONTRACT

Many practising international business lawyers insist that the contracts or networks of contracts they draft for commercial
transactions are and need to be tailor-made and thus little or no uniformity can be found.\(^12\) This view can perhaps be
supported by the fact that many commercial transactions, such as the supply of factories, technology transfer,
construction and civil works, execution of management contracts and the accompanying financial transactions, are highly
complex and require a very individualistic approach both with respect to their technicalities and their complex legal
environment. Moreover, it is the engineers, salesmen and financial experts rather than the lawyers who take the lead in
the negotiations and in the drafting of the often voluminous contracts. The lawyer has to analyse carefully the underlying
interests and potential conflicts in the transaction and to insert conflict-avoiding provisions into the contract to render it so
clear and tailor-made that little is left open to interpretation.

Even if we accept this individualistic approach, we should not overlook the fact that there is hardly any transaction in
international business which can be termed 'unique.' There are similar transactions with similar technical requirements as
to their contractual framework. The very fact that we can speak, in general terms, of a syndicated loan, a consortium, a
turnkey contract regardless of the underlying transaction and the applicable national law, seems to indicate that there is a
common understanding, at least to the extent that lawyers can communicate over types of contracts, types of clauses and
types of legal problems.

B. THE STANDARDS OF LEGAL ROUTINE; BOILER-PLATE

But the individualistic approach is only one side of the coin. Every practising international business lawyer knows that
drafting a contract means, to a large extent, copying similar contracts and inserting in their own contracts identical
standard clauses and provisions, tested in practice and blessed by

constant repetition. The bulk of these boiler-plate provisions are not merely surplusage in the contract, but fairly reflect its
legal structure.\(^13\)

Most boiler-plate provisions developed within one national legal system and within a national tradition of professional
drafting of contracts. It is natural that the contractual patterns and clauses used in international commercial transactions
should be derived from such national legal and professional traditions; but it is equally natural that, in international
markets with participants from many countries, standard forms and clauses and the wording used in contracts should
spread internationally through the same process of copying and imitation we find in national boiler-plate. There is, indeed,
a substantial degree of standardisation to be found in international contractual practice.

C. THE RECEPTION OF INTERNATIONAL UNIFORM LAW, RULES AND MODEL FORMS IN
CONTRACTUAL PRACTICE

The contractual relationship between the parties to an international commercial transaction may be subject to an
internationally uniform legal regime of mandatory rules of an international convention, such as the Hague-Visby Rules on
Bills of Lading or the Liability Rules of the Warsaw Convention on Carriage by Air.\textsuperscript{14} In many other cases, however, uniform law can be contracted out or its application may even depend upon an express 'opting in' in the contract, as in the case of the Hague Convention on the Law of Sales in Great Britain.\textsuperscript{15} The same is true for many of the non-official international publications of the International Chamber of Commerce and other agencies promulgating rules, model forms and clauses for international commerce.

The reception of all these texts in contractual practice depends upon the will of the parties. This reception, and thus its unifying effect, varies greatly and depends upon a number of factors. To begin with, of course, it is the quality of the text, clause or rule, which has to respond to practical needs and must reflect a fair balance of interests and risks. Next is the question whether the new texts are made for an area of international commerce where firmly established traditions already exist, or whether they cover a new area where there is still little legal experience and professional tradition. The startling success of the ICC Uniform Customs and Practice for Documentary Credits\textsuperscript{16} can be explained both by their suitability to the practical needs of international payments and the fact that they were based upon a certain tradition. The rather positive reception of the ICC Uniform Rules for Collections\textsuperscript{17} is likewise due to the fact that they satisfied a need for clear and uniform banking practice in this field. The Hague Convention on a Uniform Law of Sales (1964) has not been well received; the parties in industrialised countries preferred to preserve their own established practice of sales contract law\textsuperscript{18}; developing countries felt their views had not been well represented in the Convention.\textsuperscript{19} The ICC Rules on Contract Guarantees\textsuperscript{20} have not, as yet, been very successful; buyers with strong bargaining positions reject them and banks feel that they render the handling of international guarantees too burdensome.\textsuperscript{21}

In new areas of commercial transactions where little experience is available, the inclination to copy a model contract or any model rule is strongest. Such a new field is represented by turnkey contracts. Here, the FIDIC rules have found worldwide application, at least in the English-speaking world and that part of international commerce influenced by common law.\textsuperscript{22} The legislators of some developing countries have even modelled some provisions of their laws and regulations of transfer of technology on these FIDIC rules. A model contract for the delivery of fertiliser plants drafted by UNIDO has received worldwide attention for the same reason, although the UNIDO text displays some ambiguities and is confined to just one particular type of transaction.\textsuperscript{23}

D. DIFFERENT TENDENCIES IN CHOICE OF LAW AND FORUM; LIMITATIONS ON PARTY AUTONOMY

In the use of choice of law and forum clauses, different tendencies can be observed.\textsuperscript{24} In many areas of international commerce, the practising lawyer is still anxious to have his international business contracts safely anchored in the harbour of one national law through carefully drafted choice of law and forum clauses-if possible the law of his client or a trustworthy 'neutral' law.

In other areas of international commerce and in some types of transactions, no choice of law and forum clauses are found. This may be so because the parties regard the transaction as a matter of routine and rely on conflict of laws rules. In some areas, however, it appears that the parties assume that

a sufficient degree of international uniformity already exists, so that the question of applicable national law need not be decided. This seems to be the case with some inter-bank transactions. In other cases, the parties feel that the question of an express choice of law and forum clause would cause an unnecessary quarrel over a matter of prestige and impair chances for effective co-operation. Thus, some multi-party contracts on long-term cooperation, e.g. ventures on the exploitation of natural resources (mining, fishing) do not contain express choice of law clauses. Here, the parties sometimes feel that the election of any specific national law would not be helpful and would rather disturb the carefully negotiated balance of interests as reflected in the contract. This inclination to avoid the application of a national law is obvious in contracts with international institutions, such as the World Bank.\textsuperscript{25}

From these examples, one could infer a tendency to prefer an international approach to international commercial transactions; a tendency to try to regulate all relevant matters in the contract itself and to leave little to the rules of a national law that might be applicable. This tendency towards an international approach is also found in the widespread use of commercial arbitration.
In most cases, however, the parties still regard an express choice of law clause as a certain safeguard against unforeseen legal consequences. Moreover, some countries insist on the application of their own national law. This is often true with contracts where one party is a government or governmental agency, particularly in the case of developing countries. It is legal tradition in Latin American countries, and more recently the practice of some of the Arab countries has been to have contracts subjected to their own national laws and jurisdiction. This position can lead to difficult problems if the applicable national laws have no adequate solution to the legal problems which may arise out of the relevant transaction, or if the courts are not inclined to take notice of the fair expectations of foreign parties.

These problems can be more easily solved when the parties are willing to agree to international commercial arbitration, which, in fact, is increasingly the case. In addition, more countries, including those from Latin America, are willing to apply the International Convention on the Settlement of Investment Disputes.

E. LIMITATIONS ON PARTY AUTONOMY: MANDATORY CONTRACT LAW

When drafting a contract concerning an international commercial transaction, the lawyer has to take account of mandatory laws outside the *lex contractus*

which are dictated by the public policy of the states involved; in addition, he must be aware that the applicable contract law itself may contain mandatory rules which cannot be contracted out. But the aforementioned fact, that a number of governments today dictate the precise terms of the whole contract through legislation or bidding procedures, leaves a party or his lawyers with only the choice of 'take it or leave it.' No bargaining and no negotiations on the drafting of the contract are allowed.

This can sometimes create a difficult situation. It is not surprising that a party with a strong bargaining position tries to dictate the terms of the contract. And it is natural that governmental agencies must safeguard the best interests of their country. However, there remains the great danger that bargaining procedures become too rigid, and that existing rules cease to match the needs of the transaction in question. In this respect, it is a positive factor that most national legislators are willing to follow some international standards in their rule-making. It seems that a number of developing countries are interested in establishing fair international rules of substantive law in sensitive areas such as the transfer of technology. Moreover, some countries seem willing to bargain over their rules in a given case if they are convinced that the particular problems of the transaction require it.

III. The Transnational Law of International Commerce; Concepts and Prospects for Uniformity

In order to draw some conclusions from our observations, and as an introduction to the following articles in this book, we must now turn to the question of what degree of uniformity has been reached or can be expected in the law of international commercial contracts. We must reach some conceptual clarity in the sometimes confusing discussion on 'unification', 'transnational law' and 'lex mercatoria' which enables us to use these terms in an analysis of the realities of international commerce.

A. LEX CONTRACTUS AND NATIONAL LAW

Contracts for international commercial transactions are normally governed by the national law of a given country (the *lex contractus*), according to national conflict of laws rules concerning contracts (sometimes also termed *lex contractus*) and often under express choice of law clauses. It is still a widely accepted rule that each contract with a private (non-sovereign) party is necessarily governed by a national law, and that there are no 'homeless' contracts or obligations in international commerce. On the other hand, with respect to the aforementioned practice of purposely omitting an express choice of law, one could argue that the parties can, at least under certain circumstances, entirely disconnect their contract from any national law. This may be the case in contracts with an international institution such as the World Bank, or in multi-party contracts involving governmental agencies and private parties of various states. It seems that today the 'no homeless contract' rule is not without exceptions.
Both in the normal case of a private contract under an applicable national contract law and in the still rather exceptional and debated case of a ‘homeless’ contract, the private parties make use of their party autonomy as conferred and recognised by the national laws in question. They make use of this autonomy not only in the choice of applicable law, but also in the precise regulation of the substance of their contractual obligations; thus they substitute the (non-mandatory) rules of applicable law with their own freely agreed arrangements, their private *lex contractus.*[^34] If we look for uniformity in international commercial contracts, we have to inspect not only the applicable contract laws, but also the substance of the contractual arrangements, the freely agreed ‘*lex contractus’.*

### B. THREE CONCEPTS OF TRANSNATIONAL LAW

Despite the usual connection between a private contract and its applicable national contract law, the transnational (i.e. cross-border) character of a commercial transaction entails specific legal problems and consequences. The most suitable way to describe them is to adopt the modern term ‘transnational law’. This term in fact points to a variety of interrelated and complex problems which are of daily concern for the international business lawyer. In order to avoid confusion, however, we must strictly distinguish three separate usages of the term ‘transnational law’:

1. **All Law Pertaining to Transnational Transactions**

   ‘Transnational law’ in the broadest sense has been defined by Jessup as ‘all law which regulates actions or events that transcend national frontiers.’[^36] This is just a label for all legal norms governing international business contracts and might serve as a mere description of the complex legal circumstances surrounding international transactions. It is common that a variety of norms outside the *lex contractus,* from at least two and often more national legal systems, have an impact on the contract. These may be laws on exchange controls, taxation, safety rules, etc. This is in addition to the strict rules of national contract, business or company law which must be respected.

   The drafters of international commercial contracts have to take into account the various legal environments and complex legal situations, which might be relevant not only when drafting clauses on choice of law and forum, but also when deciding on the time and manner of delivery and payment (including the role of banks and the use of specific sureties), and clauses on specific dispute settlement procedures. These contractual provisions dealing with the transnational situation might equally be labelled ‘transnational law’ in so far as they constitute legally binding *lex contractus.*[^35]

2. **De facto Uniform Law and Contractual Patterns**

   But we can go one step further and single out those legal rules, principles and contractual patterns which are internationally used or recognised in a uniform or similar way although they may stem partly from different national laws. Here, ‘transnational law’ describes an actual uniformity or similarity of rules and patterns. In fact, international commerce is, to a growing extent, guided and co-ordinated by such uniform rules and patterns.[^37] This phenomenon of uniform rules serving uniform needs of international business and economic co-operation is today commonly labelled *lex mercatoria.*[^38]

3. **International Sources of Law; Uniform Law**

   Finally, the term transnational law can also be used as a label for internationally uniform law in the proper sense, based
on international sources of law, i.e. either on conventions ('international legislation') or on customary law. In addition, we
should note commercial custom which, though not a legal source in a technical sense, has some important functions
similar to those of a true legal source.

Examples of international conventions can be found in the law of international transportation of goods by sea, air and
land. An important recent piece of international legislation on international commerce, the 1980 United Nations
Convention on Contracts for the International Sale of Goods, will be discussed in this book. Such conventions, once
signed by the signatory states and embodied in their national legal systems, will be an important international source of
uniform commercial law. This source has the great advantage of clarity and is a suitable vehicle for imposing mandatory
rules of law on the persons to whom it is addressed. For example, the Hague-Visby Rules on Bills of Lading cannot be
contracted out. On the other hand, the drafting, negotiating and ratification procedures necessary to bring such
conventions to life (often followed by procedures to transform them into municipal law as prescribed by the national
constitution) are time-consuming and difficult. International legislation, therefore, can be confined only to select and
particularly important legal issues.

International customary law, on the other hand, is only of limited assistance in solving legal problems of international
commerce. There are few legal principles, such as pacta sunt servanda, which are generally recognised and can be
termed international customary law. It is true that the general principles of customary law provide common ground for
lawyers from civil law and common law countries. But these principles are difficult to apply in specific cases, and courts
in various countries have been extremely reluctant to resort to rules of international customary law when deciding issues involving private contracts.

C. INTERNATIONAL COMMERCIAL CUSTOM AND USAGES

From a practical point of view, the relevant alternative to international legislation is not so much customary law as
international commercial custom in the widest sense, i.e. commercial usages, standard clauses, contracts or contractual
rules. Commercial custom presupposes the de facto uniformity we find in certain contracts, contractual clauses or types of
transactions already mentioned. Not every instance of uniformity in commercial and legal practice can be termed
commercial custom, but some can. Commercial custom provides guidance in the interpretation of contracts, their legal
meaning and effect. If standard contracts, standard clauses or rules on the interpretation of such contract clauses are
published by semi-official international agencies such as the International Chamber of Commerce, the de facto
recognition and use of such contractual patterns and rules may lead to a new commercial custom or reflect an already
existing one. One can speculate whether such publications sometimes reflect or help to create international customary
law. In any event, their legal effect on a given contract can be assured by the parties if they expressly embody the
clauses or rules in question into their contract and thus make them part of the lex contractus.

D. THE QUEST FOR UNIFORMITY

1. The Concept of Lex Mercatoria

The articles in this book have been selected to appraise and evaluate to what extent uniformity in legal rules and
contractual patterns of international commerce can be found, i.e. whether we can identify a ‘transnational law’ of
international commerce in the sense of factual uniformity (subsection B, para. 2, above) or in the sense of truly
international (‘autonomous’) sources of law (subsection B, para. 3, above): It is just that sort of question which is
contemplated in the discussion on a new lex mercatoria: a uniform and, in some ways autonomous, law of international
commerce. A comprehensive theoretical discussion of this doctrine is not intended in this book, whose contributions
have a more practical orientation. But we should bear in mind that some confusion may be found in discussions on lex
mercatoria or uniform law, and our different definitions of ‘transnational law’ can help us to overcome this.

With regard to ‘international legislation’, i.e. conventions on commercial matters which undeniably create uniform law,
there is no difficulty in using the label lex mercatoria or transnational law in its proper sense (section B, subsection 3,
above). When some authors speak of lex mercatoria as the ‘autonomous law’ of international trade, the term
‘autonomous’ can, in the context of international legislation, only mean that we have an international instead of a national
source of law. It is a little more difficult if we use lex mercatoria as a mere descriptive concept to describe existing de facto
uniformity or similarity of the national laws and contracts concerning international commerce (subsection B, para. 2, above). Here, a further distinction is in order. If we look first at certain similarities in national legislation or court decisions on, say, sales contracts or patent licences, which comparative lawyers traditionally try to discern, we should be rather cautious not to label these *de facto* similarities as 'transnational law' (within our second definition, subsection B, para 2, above). Those similarities are welcome, and may be a first step towards uniformity; but by no means can we speak here of elements of an 'autonomous' law of international commerce.\(^{46}\)

With respect to contracts in international commerce and the standard clauses used in them, we can more easily speak of an 'autonomous' law, at least in the sense that the parties themselves create the legal regime for their transaction, a *lex contractus*. It has often been said that this autonomy is not in conflict with the applicability of a national law because the parties make use of a contractual autonomy which is conferred and recognised by national laws.

To what degree one can speak of uniformity when examining standard clauses, contractual patterns and rules is debatable. The first controversy arises in recognising and evaluating *de facto* uniformity or similarity.\(^{47}\) Generalities are of little use here; instead we must inspect specific clauses, rules or transactions, and their practical use and impact. This is the actual purpose of many of the articles in this book. The truly crucial question comes when we find such *de facto* similarity and must ask whether the clauses, rules or patterns have some normative effects beyond the individual contract in which they are expressly included or referred to. Here, we return to our problem whether international practice might have created international commercial custom or even customary law. As mentioned previously, this question is particularly interesting in the case of certain semi-official and widely distributed publications from UNCITRAL, ICC and other agencies.

### 2. The Interests of Developing Countries

It is a particular concern of developing countries as parties in international commerce and economic co-operation to protect their economic interests.

When dealing with partners from industrialised countries whom they deem economically stronger and more experienced in legal issues and the other technicalities of international commercial transactions. It has been argued that the best way to protect these interests is not a unification of the law of international commerce, but, instead, a legal regime reflecting the particular needs of the individual developing countries which is imposed on international commercial transactions either through mandatory national legislation or individual negotiation.\(^{48}\) In contrast, the majority of developing countries seem to have adopted the view that long-term international economic cooperation based upon mutual confidence is best served through, at least, a certain degree of legal uniformity in international commerce. They feel that uniformity of rules is not as important as the assurance that the rules will be fair and equitable. The fact that many developing countries have taken an active part, e.g. in the negotiation of the new Convention on Contracts for the International Sale of Goods, reflects this conviction.

As to the fairness of existing rules of commercial law and contractual clauses and patterns, developing countries have sometimes argued that these generally only reflect the interests and values of the industrialised countries. A simple response is not possible. As a matter of fact, future unification of the law of international commerce must engage the active participation of developing countries in the process of negotiating and drafting the rules to ensure that their views are adequately represented. It was due to this problem that the 1964 Hague Convention from the outset had little chance of gaining acceptance by third-world countries. Because developing countries were consulted in its drafting, the 1980 UN Convention on Contracts for the International Sale of Goods has a good chance of wide acceptance. Additionally, the more developing countries are involved in, and gain experience with, the technicalities of international commercial transactions, the more they will make a clear distinction between those legal rules and patterns which are necessary for co-operation and conflict avoidance, and those which entail unjust risk distribution or other unfair results. In such a manner, the distinction between the law of developed and less-developed countries will, as such, disappear and be substituted by a common understanding of the problems of international commerce.

The efforts toward unification of the law of international commerce are not unaffected by the demand for a 'New International Economic Order' for the benefit of developing countries. In various resolutions of the UN General Assembly, developing countries have expressed a strong demand for the establishment of such an order to assure a redistribution of market shares, income and resources in their favour.\(^{49}\) Some of the subsequent efforts to cast this concept into legal norms had an impact on the law of international contracts. In the UNCTAD Draft Code on the Transfer of Technology, a number of provisions deal with fair contractual terms and provisions in the
interest of third-world countries. Even if the Draft Code does not obtain general approval, it will not fail to have an impact on the relevant legislation of third-world countries and on their bargaining attitude. The negotiation and drafting of this and other UN Codes have initiated a worldwide learning process on legal issues of international commerce and economic cooperation. On the other hand, it would help the discussion and facilitate the difficult business of unification of law, if everybody would see that rules on the law of commercial contracts, as such, cannot bring about the economic redistribution expected by many from the New Economic Order. What a good contract law can do, at best, is to ensure fairness and clarity in a freely agreed international commercial transaction.

3. Formulating Agencies and the Role of Legal Science

A number of international organisations and institutions of varied legal status are active today in the elaboration and definition of uniform legal rules and patterns of international commerce. These activities are aimed either at the preparation of new international ‘legislation’, such as the UN Convention on Contracts for the International Sale of Goods, or are aimed at the promulgation of standard rules and clauses. The endeavours of these agencies, which will be generally described in Part Two of this book and further analysed in some of the subsequent articles, reflect a growing consensus among the international community that there is a need to unify or at least harmonise the law of commercial contracts and to standardise their patterns. It goes without saying that every such effort to define such uniform rules and patterns is aimed at bringing about not only more clarity and certainty but also more fairness through the balancing of interests.

Apart from these institutions and organisations, legal science has the important function of supporting and amending these efforts in two ways. First, in the drafting and negotiating process, the co-operation of legal scholars is needed to bring about a common international understanding of the legal issues and interests involved. Secondly, once a text on international commercial law (a convention or a formulation of rules or clauses) has been promulgated, its uniform application in practice can only be assured if a common understanding of its legal terms and principles is worked out by legal experts all over the world in a common effort. A common language for lawyers is needed.

* Professor of Private and Commercial Law and Private International Law, University of Bielefeld, Faculty of Law.
1 Detailed documentation of the general economic data mentioned here is not intended. For the significant role of liberalised world markets for world development, see, e.g. World Bank, World Development Report, p. 23 et seq. (August 1979). On the phenomenon of economic integration in general, see Balassa, The Theory of Economic Integration (1961); Krauss (Ed.), The Economics of Integration (1973); Robson, 'Current Problems of Economic Integration', (Report prepared for the UNCTAD Secretariat, 1971); Tinbergen, International Economic Integration (2nd. ed., 1965); on recent developments, see, e.g. OECD Development Assistance Committee, Development Cooperation (December 1980).
2 For background on the new status of the oil-exporting countries, see Abolfathi, The OPEC Market to 1985 (1977); Ajami, Arab Response to the Multinationals (1979) (especially the excellent bibliography at pp. 142-143); Conant and Gold, The Geopolitics of Energy (1978); Deutsche Bank, OPEC: 5 Jahre nach der Erdölverteuerung (1978); Rybczynski (Ed.), The Economics of the Oil Crisis (1976).
4 An excellent example of this is evidenced by the current role played by Arab banks in international banking. See Special on Arab banking in Euromoney (July 1981), pp. 57-137.
5 See contributions contained in Part Four, infra, pp. 175 et seq. See also Horn, 'Codes of Conduct for MNEs and Transnational Lex Mercatoria: An International Process of Learning and Law Making', in Horn (Ed.), Legal Problems of Codes of Conduct for Multinational Enterprises, p. 45 et seq., especially p. 69 and accompanying text.
7 See Page, 'Transnational Mining Contracts', infra, p. 223 et seq.
11 ICC, Rules for the Regulation of Contractual Relations (ICC publication No. 326, 1978); see also Rowe, 'The
Contribution of the ICC to the Development of International Trade Law', infra, p. 51 et seq.; UNCITRAL Conciliation Rules, UN GA Res. 35/52 (Dec. 4, 1980), UN publ. sales No. V. 81-22309; see generally Herrmann, 'The Contribution of UNCITRAL to the Development of International Trade Law', infra, p. at p. 35 et seq.

12 This view is strongly (and perhaps too categorically) expressed by Slater, 'The Transnational Law of Syndicated Loans - A Hopeless Cause?', infra, p. 329 et seq. at 351.

13 However, one must admit that a number of boiler-plate provisions are often not really necessary, and are included without due regard to the needs of the transaction in question.


15 Ibid., at 141.

16 ICC publication No. 290 (1974); for discussion on the Uniform Customs and Practice, see Rowe, supra, note 11; Ellinger, 'Letters of Credit', infra, p. 241 et seq.

17 ICC publication No. 322.


19 See section III, subsection D, para. 2, infra.


22 See supra, note 9. For further discussion of the FIDIC model conditions, see Westring, 'Construction and Management Contracts', infra, p. 175 et seq.; Oberreit, 'Turnkey Contracts and War: Whose Risk?', infra, p. 191 et seq.

23 'UNIDO Model Form of Turnkey Lump Sum Contract for the Construction of a Fertilizer Plant', (July 1982).


26 On contracts with Arab countries, see Böckstiegel, supra, note 8; on contracts with Latin America, see Sassoon, supra, note 8, at p. 32.


28 See section I, subsection C, supra. The World Bank's Guidelines for Procurement under World Bank Loans and IDA Credits (March 1977) and its General Conditions Applicable to Loan and Guarantee Agreements (October 27, 1980) have both inspired and guided national legislation.

29 See contributions by various authors in Horn (ed.), Legal Problems of Codes of Conduct for Multinational Enterprises (1980), especially those by Buxbaum, Fatouros, Wilner, Fikentscher, Syquia and Grigera-Naón.

30 The term lex contractus (literally 'law of the contract') is used in three different ways: (1) to describe the national law applicable to the contract; (2) to describe the conflicts rule which determines the national law applicable to the contract; and (3) to describe the legal regime governing the parties which they themselves established through the substantive provisions of their contract.


32 This problem was formerly extensively discussed with respect to international loans; see League of Nations, 'Report of the Committee for the Study of International Loan Contracts' (1939), p. 74; The Serbian and Brazilian Loans Cases, Judgments Nos. 14 and 15, Series A, Nos. 20 and 21 (Permanent Court of International Justice, July 12, 1929); Quindry-Feilchenfeld, Bonds and Bondholders, Vol. II, p. 632 (1934).

33 See section II, subsection D, supra. No national law is applicable, e.g. to a contract between the World Bank and a private party; neither is it applicable in disputes governed by the ICSID Convention; see Delaume, 'Issues of Applicable Law in the Context of the World Bank's Operations', infra p. 317 et seq. at 320-322.

34 See supra, note 30.

35 Ibid.


37 For an example of this in the field of Eurobond agreements, see Horn, 'A Uniform Approach', supra, note 24.


40 See Grigera-Naón 'The UN Convention on Contracts for the International Sale of Goods', infra, p. 89 et seq.; Honnold,
'Uniform Law and Uniform Trade Terms - Two Approaches to a Common Goal', infra p. 161 et seq.; Schlechtriem, 'From the Hague to Vienna - Progress in Unification of the Law of International Sales Contracts?', infra p. 125 et seq.

41 See supra, note 14.
43 For a detailed discussion of customary law, see Allen, Law in the Making (7th ed., 1964), pp. 67-151.
44 See generally contributions contained in Part Two, infra.
45 See discussion in section III, subsection B, 3, supra; see also discussion concerning letters of credit in Ellinger, 'Letters of Credit', infra p. 241 et seq. at 272.
46 See, supra, note 38, and references accompanying text.
47 An overly enthusiastic readiness to find uniformity is expounded by Langen, supra, note 36. For a critique thereof, see Pfaff, 'International Licensing Agreements, Transfer of Technology and Transnational Law', infra p. 199 et seq. at p. 208-209.
48 This sceptical view of the future for unification is held by Slater, supra, note 12.
49 On the function of these and similar resolutions, see Dolzer, 'International Agencies for the Formulation of Transnational Economic Law', infra p. 61 et seq.
50 See Horn (Ed.), Legal Problems of Codes of Conduct, supra, note 5.

Referring Principles:

I.1.1 - Good faith and fair dealing in international trade